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March 3, 1995

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Ex Parte - PR Docket 94-103

Dear Mr. Caton:

On February 16, 1995 representatives of GTE Service Corporation and GTE PCS met with M. Wack, S. Wiggins and J. Phillips to discuss issues raised in the above-referenced matter. During this ex parte discussion, several questions concerning various issues related to the preemption of state regulation of rates were raised by staff which stimulated us to review the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI Section 6002(b), 107 Stat. 312 (1993) ("OBR"), Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd. 1411 (1994), ("Second Report and Order"), Erratum, 9 FCC Rcd. 2156 (1994), and the legislative history surrounding the OBR for answers. In particular we analyzed an interpretation of the OBR which posits that while Section 332 clearly preempts state regulation of CMRS rates, it does not empower the FCC to regulate CMRS intrastate rates and thus creates a jurisdictional "limbo." As will be discussed in Part I of this memo, we found ample evidence that Congress preempted state jurisdiction over intrastate CMRS rates and firmly ensconced the FCC in their stead. Second, we reviewed the Senate's mark-up session of June 15, 1993 to see if it constituted persuasive legislative history. In Section II we discuss why the plain meaning of the OBR moots the necessity to divine "congressional intent" and why Senator Dorgan's Statement does not constitute evidence of legislative intent. Lastly, Section III contains a brief overview of the states which determined that cellular was competitively provided in their jurisdiction and states which, after reviewing the competitive nature of cellular, opted to either deregulate or not regulate cellular.

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I. The Jurisdictional "Limbo" Construct is Unpersuasive

The concern was raised that 47 U.S.C. Section 152(b) may create a jurisdictional "limbo" in the exception it provides, for Section 332 of Title 47, from the general stricture that the FCC shall not have ". . . jurisdiction with respect to . . . regulations for . . . intrastate communications . . ." or communications that are interstate only " . . . through physical connection . . . " with another entity.[1] A jurisdictional "limbo" arises, it is argued, because the other exceptions to Section 152(b), namely Section 223 through 227, contain specific jurisdictional grants to the Commission, while Section 332 does not. It is argued that this "failure" of Section 332 to explicitly grant the FCC jurisdiction creates a jurisdictional "no man's land" in which States are preempted, but the FCC is not authorized to act.

For several reasons, this concern is unfounded and no jurisdictional "limbo" exists. First, the language of Section 332 is explicit. Section 332(c)(3)(A) provides that "Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service provider . . . .." The commonly understood meanings of "[n]otwithstanding" and "shall" should in themselves remove any doubts concerning the purpose of Section 332(c)(3)(A) regarding federal jurisdiction. Since federal preemption is a question of statutory intent, courts ". . . begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." Morales v. Trans World Airlines, Inc., 112 S.Ct. 2031, 2036 (1992), quoting FMC Corp. v. Holliday, 111 S.Ct. 403, 407 (1990). See MCI v. AT&T, ___ U.S. ___, 62 U.S.L.W. 4527 (1994) The absolute terms employed by Congress in revising Section

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[1] 47 U.S.C. Section 152(b) provides in part: "Except as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V-A of this chapter, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier . . .."

152(b) are antithetical to the notion that Congress designed anything less than the removal of State jurisdiction over intrastate rates and the concomitant distribution of jurisdiction to the FCC.

Second, Congress' decision to revise Section 332(c)(1)(A) to redefine cellular and other forms of wireless telephony to be common carriers evidences Congress' design to give the FCC jurisdiction over CMRS providers regardless of the intrastate or interstate nature of the service the CMRS carriers provide. If the Congress had intended CMRS providers to be unregulated at either the state or federal level, it would not have gone to the considerable effort to re-classify them as common carriers rather than private carriers.

Section 332(c)(1)(A) now states that "[a] person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter . . .." Common carrier is further defined by the Act as ". . . any person engaged as a common carrier for hire, in interstate or foreign communication by wire or in interstate or foreign radio transmission of energy . . .." 47 U.S.C. Section 153(h). All providers of CMRS, as common carriers, are therefore deemed to be engaged in the interstate provision of service and subject to the FCC's jurisdiction regardless of the intrastate service they undoubtedly provide. Therefore, by defining all providers of commercial mobile radio service as common carriers and hence necessarily as interstate, Congress expressed its intent that such providers, even if in fact they provide only intrastate service, would be "treated as" interstate carriers and thus be subject to the jurisdiction of the FCC.

Third, Congress made clear the FCC's role as the jurisdictional heir to the states by prohibiting the FCC from forbearing from enforcing three Sections of the Communications Act of 1934 which relate directly to rates. While Section 332(a)(1)(A) grants the FCC discretion to forbear from classifying CMRS providers as common carriers for ". . . such provisions of subchapter II of this chapter as the Commission may specify by regulation as inapplicable to that service or person," it precludes the FCC from forbearing from Sections 201, 202, and 208 of Title 47. Sections 201 and 202 prohibit common carriers from providing service at rates that are unjust or unreasonable or unjustly or unreasonably discriminatory. Section 208 provides complaint procedures for bringing violations of the Act committed by common carriers before the Commission, and empowers the Commission to investigate such matters as it deems appropriate. Clearly by these actions Congress thrust the FCC into a broader role in regulating

CMRS rates at the very time Congress was preempting the states from rate regulation. These two simultaneous actions are consistent and complementary. On the other hand, proponents of the jurisdictional "limbo" theory are left in a quandary: if Congress designed a jurisdictional "no-man's land," why did Congress simultaneously empower the FCC to ensure that both intrastate and interstate CMRS rates were provided consistent with Sections 201 and 202 of the Act? Clearly, if Congress did not intend a broad role for the FCC in the regulation of CMRS providers, Congress would not have forbidden the Commission from forbearing from enforcing these sections against common carriers.

Fourth, the absence of specific language granting jurisdiction in Section 332 should not be dispositive in light of Congress' overarching intent, as expressed throughout the OBR and specifically in Sections 332 and 152(b) as revised, to preempt state regulation and establish regulatory parity among CMRS carriers. It is well settled caselaw that a statute ". . . must be construed and applied in recognition of existing conditions and with a view to effectuate the purposes for which it was enacted." Essex v. New England Teleg. Co., 239 U.S. 313, 322 (1915). In reaction to rapid developments in mobile services and the perceived functional obsolescence of existing regulations, Congress revised the Communications Act by enacting the OBR. See Second Report Order, pp. 1414-1417, 1415, para. 7, and 1417 paras. 11 and 12. Upon review of the OBR, the Commission found that Congress envisioned a regime of "regulatory symmetry among similar mobile services,"[2] and ". . . has explicitly amended the Communications Act to preempt state and local rate and entry regulation of commercial mobile radio services . . . ." Second Report and Order, 9 FCC Rcd. 1411, 1506, para. 256 (1994).[3] If the FCC were left

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[2] Second Report and Order 9 FCC Rcd. at 1413, para. 2.

[3] We note that the Second Report and Order does contain one sentence which states that Commission jurisdiction does not extend over intrastate rates. Second Report and Order, p. 1480, para. 179. However, within this same paragraph, the Commission appears to reverse course. The Commission states that States may "require CMRS providers to file terms and conditions of their intrastate services" but that States would have to "petition the Commission to regulate intrastate commercial mobile service rates." Id. This is consistent with the jurisdictional analysis that posits that states' jurisdiction over cellular is reduced to "other terms and conditions." See Second Report and Order, p. 1480, para. 179, p. 1506, para. 257. In addition, the text of the Order is replete with findings by the Commission that the OBR clearly preempted

with jurisdiction over interstate CMRS providers, but not intrastate providers, then an even greater disparity than that which Congress sought to eliminate would be institutionalized.

II. The Plain Meaning of the OBR Moots the Necessity of Divining Congressional Intent, and, In Any Event, Senator Dorgan's Statement Does Not Constitute Legislative Intent

Senator Dorgan's Statement, which was appended to an unpublished transcript of the June 15, 1993 Senate mark-up session of S. 335, cannot be relied upon as an indication of the Senate's legislative intent for two reasons: 1) the plain meaning of Section 332 negates the need for analysis of legislative intent; and 2) Senator Dorgan's comments are not a reflection of what S. 335 stood for, but rather a lamentation over what he would have liked included in the bill.

First, it is well settled law that in determining the meaning of a statute, the plain meaning of its language, taken in context, is to be afforded the greatest weight. See Morales v. Trans World Airlines, Inc., 112 S. Ct. 2031 (1992). As discussed in Section I, Congress revised Sections 332 and 152(b) utilizing absolute terms which preempted state regulation of intrastate rates while simultaneously defining CMRS carriers as "common carriers" and prohibiting the FCC from forebearing from regulating CMRS carriers' rate offerings pursuant to Sections 201, 202, and 208. Thus, as Congress closed the door on states' jurisdiction over intrastate rates, it opened the jurisdictional door for the FCC.

In light of this clear and consistent regulatory scheme, it is unnecessary to delve into the uncertain waters of legislative intent. Previously, the Supreme Court found that ". . .

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state rate jurisdiction. See Second Report and Order, p. 1504, para. 250, p. 1506, para. 257. Further, the Commission finds that although Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986) stated that Section 2(b) prohibited the FCC from exercising jurisdiction over intrastate rates, Congress preempted state regulation without regard to the provisions of Section 2(b), and hence the standards adopted in Louisiana PSC are not applicable to the rules the FCC adopted in the Second Report and Order. Second Report and Order, p. 1506. para. 256. Given the numerous and significant statements contained in the Second Report and Order which support a finding that Congress substituted the FCC for the states in rate regulation, the Commission has ample basis to clarify and redefine its earlier statement.

legislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its natural meaning." Id. at 2037.

Perhaps of even greater concern is the trepidation expressed by the Supreme Court in Regan v. Wald, 104 S. Ct. 3026, 3035 (1984) over searching for legislative intent:

> Oral testimony of witnesses and individual Congressmen, unless very precisely directed to the intended meaning of particular words in a statute, can seldom be expected to be as precise as the enacted language itself. To permit what we regard as clear statutory language to be materially altered by such colloquies . . . would open the door to the inadvertent, *or perhaps even planned, undermining of the language* actually voted on by the Congress and signed into law by the President. (emphasis added)

The plain meaning of the OBR coupled with the reluctance of the Court to plumb the depths of "legislative intent" render a review of Senator Dorgan's Statement unnecessary. However, as discussed below, a close analysis of Senator Dorgan's Statement would reveal that his remarks are not an indication of legislative intent, but rather an expression of his disappointment that the bill was not written differently.

Contrary to the suggestion made by the Cellular Resellers Association, Inc. ("CRA") in their Reply Comments,[4] Senator Dorgan was not remarking on the actual standard to be utilized in reviewing state petitions. A review of the Senator's oral comments in the mark-up hearing of June 15, 1993 and his written Statement clearly demonstrate that the Senator was opining as to what he would have liked the bill to have done. At the actual mark-up session Senator Dorgan said only that: "I am not fond of preemption of state rights, but I will not spend time on the issue today . . . "[5] and issued the Statement relied upon by the CRA. The text of the Statement further underlines the dissenting nature of his comments. Senator Dorgan begins his Statement with the avowed

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[4] See Reply to Oppositions to the Petition of the People of the State of California and the Public Utilities Commission of the State of California, filed by Cellular Resellers Association, Inc., in PR File No. 94-SP3 on October 19, 1994, p. 4.

[5] Written transcript of the June 15, 1993 mark-up session of the Senate Commerce Commission, p. 6.

purpose to "state my reservations about certain provisions of this bill"[6] and argues that the federal interest in the rapid provision of wireless service ". . . ought to include a presumption . . ." (emphasis added).[7] These are not the statements of a legislator chronicling the intent of his fellow legislators but rather a soliloquy designed to highlight what he would have liked S. 335 to have said.[8]

There is ample precedent that statements such as those made by Senator Dorgan do not constitute legislative history. In Shell Oil Co. v. Iowa Dept. of Revenue, 109 S. Ct. 278, 284 (1988),[9] the Supreme Court, in determining whether statements made by a Senator opposing legislation constituted legislative history, stated that: "'[T]he fears and doubts of the opposition are no authoritative guide to the construction of legislation.'" Similarly, in Bath Iron Works v. Director, OWCP, 113 S. Ct. 692, 700 (1993), the Court, in finding the statutory text unambiguous on a particular issue, gave ". . . no weight to a single [arguably contrary] reference by a single Senator during floor debate in the Senate."

Senator Dorgan was exercising his right to voice his concerns and disappointments with the manner in which S. 335 was written. Thus this does not constitute legislative intent, and it would be improper to afford his comments such status.

III. Cellular Competition and 42 States' Decision Not to Regulate Cellular Rates

In its deliberations over whether a state's regulation of rates should be retained, the Commission must pursuant to Section

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[6] Statement of the Honorable Byron L. Dorgan on S. 335, The Emerging Telecommunications Technologies Act, June 15, 1993, page 1.

[7] Id. at p. 2.

[8] At one point Senator Dorgan does express his understanding of what the bill actually accomplished when he states: "In S. 335, state regulatory efforts would be preempted from regulating mobile communications services." Id. at p. 1. He reaffirms the broad nature of preemption when he states: ". . . S. 335 goes beyond establishing a level playing field, it effectively de-regulates the cellular industry." (emphasis added). Id.

[9] Quoting Gulf Offshore Co. v. Mobile Oil Corp, 453 U.S. 473, 483, 101 S. Ct. 2870, 2878 (1981) (further citations omitted).

20.13 consider whether the cellular market in each petitioning state protects subscribers against unjust or unreasonable or unjustly or unreasonably discriminatory rates. Thus, to date the vast majority of comments and reply comments have been focused upon the market conditions in the eight petitioning states.

GTE believes that in forming its conclusions concerning each of the eight petitioning states, it is appropriate for the Commission to consider the regulatory and marketplace experience of the remaining 42 states. Bell Atlantic surveyed each State and stated in its Comments in In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, that "[t]he vast majority of states have decided not to regulate cellular service, despite the Commission's open invitation for them to do so." Comments of Bell Atlantic Companies, filed November 8, 1993 ("Bell Atlantic"), p. 24, citing "Statement of Cheryl A. Tritt, Chief, Common Carrier Bureau, Hearing Before the Senate Committee on Energy and Public Utilities, California Legislature, January 12, 1993." Further, ". . . many states which at one time imposed rate regulation have abandoned it." Bell Atlantic, p. 24.

One state that decided to deregulate CMRS recently is the State of Massachusetts. In response to OBR establishing August 10, 1994 as the petition date, the Massachusetts Department of Public Utilities ("the Department") opened an investigation to determine whether to petition the FCC to retain jurisdiction over CMRS rates. The Department examined the Massachusetts cellular marketplace and found that it is competitive, and that market forces were sufficient to prevent rates that are unjust, unreasonable, or unjustly or unreasonably discriminatory. See Investigation by the Department of Public Utilities upon its own Motion on Regulation of Commercial Mobile Radio Services, Docket D.P.U. 94-73, August 5, 1994, attached hereto. The Department ordered that CMRS rates and other terms and conditions would no longer be regulated by the State of Massachusetts.

In addition, GTE is aware of three other states that have conducted similar investigations and determined that they would not petition the FCC to retain rate regulation. The Public Service Commissions of Kentucky, South Carolina, and West Virginia decided not to petition the FCC after reviewing their CMRS offerings in their respective states. See Inquiry into the Provision and Regulation of Cellular Mobile Telephone Service in Kentucky, Administrative Case No. 341, Public Service Commission, Commonwealth of Kentucky, August 5, 1994; FCC Regulations - Comments seeking Approval to Continue with its Rate and Entry Regulation of all Commercial Mobile Radio Service Providers, Docket

No. 94-356-C, Order No. 94-630, Public Service Commission of South Carolina, June 29, 1994; General Investigation into State Regulation of Cellular/Wireless Telecommunications Rates, Case No. 93-1167-C-GI, Public Service Commission of West Virginia, March 21, 1994.

The North Carolina Utilities Commission repealed its rate regulation of cellular in 1992, finding that "'. . . the provision of cellular service in North Carolina is competitive . . .' and that tariffing or other rate regulation was unnecessary." Id., quoting Exemption of Domestic Public Cellular Radio Telecommunications Service Providers from Regulation Under Chapter 62 of the North Carolina General Statutes, Docket No. P-100. February 14, 1992, attached as Appendix 1 to Bell Atlantic.

The Maryland Public Service Commission found similarly in 1990:

> Evidence confirms that the cellular telephone providers operating in Maryland are acting competitively by improving service and lowering prices. Furthermore, a majority of the states have deregulated or vastly reduced regulation of cellular service. This experience supports the conclusion that regulation is not required to protect the public interest.

Bell Atlantic, p. 25, quoting A Report on Cellular Telephone Service in Maryland, Joint Chairman's Report, September 1990, pp. 1-2, attached as Appendix 3 to Bell Atlantic.

The New York Public Service Commission has also found that competition exists in the provision of cellular service. See New York Public Service Commission, Case 29469, Opinion and Order, May 16, 1989.

Further, within the last five years, other states, after viewing the cellular market in their respective states, have either detariffed or deregulated cellular service: Alabama (1990), Arkansas (1992), Maine (1992), Illinois (1992), and Ohio (1993). In addition, according CTIA State by State Regulatory Update, June 1990, appended to Bell Atlantic as Attachment A to Appendix 3 (A Report on Cellular Telephone Service in Maryland), 26 other states and the District of Columbia do not regulate cellular service.

Thus, the trend that clearly emerges is that state after state has determined that state regulation of intrastate cellular rates in unnecessary. This message was reaffirmed by the decision of 84% of the states not to file a petition to retain jurisdiction and

thus permit the preemption of their jurisdiction over intrastate CMRS rates without objection. The vast majority of states have determined that the marketplace, not state regulators, adequately protect the subscriber. GTE respectfully submits that in light of the experience in the overwhelming number of states, the claims of the petitioning states must be subjected to a high level of scrutiny.

Please include this letter in the record of this proceeding in accordance with the Commission's rules concerning ex parte communications.

Sincerely,

Carol L. Bjelland

cc: J. Cimko
M. Wack
S. Wiggins
J. Phillips

08/05/94 [Commercial Mobile Radio Services] Investigation by the Department of

Docket No.: D.P.U. 94-73

Date: August 5, 1994

Parties: [Commercial Mobile Radio Services] Investigation by the Department of Public Utilities upon its own motion on Regulation of Commercial Mobile Radio Services.

Appearances:

I. INTRODUCTION

On April 22, 1994, the Department of Public Utilities ("Department") voted to open an investigation on its own motion into the regulation of commercial mobile radio services ("CMRS"), also known as radio common carrier ("RCC") services. The investigation was docketed as D.P.U. 94-73. On August 10, 1993, the Omnibus Budget Reconciliation Act ("Budget Act") was signed into law by the President.[1] The Budget Act amends the Communications Act of 1934 by preempting state and local entry and rate regulation of both commercial and private mobile radio services as of August 10, 1994.[2] However, states may regulate other terms and conditions of CMRS. Also, the Federal Communications Commission ("FCC") shall allow states to continue CMRS rate regulation if the state can demonstrate that:

> (1) market forces in the state are inadequate to protect the public from unjust and unreasonable wireless service rates or from rates that are unjustly or unreasonably discriminatory; or
>
> (2) such market conditions exist and such service is a

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[1] Omnibus Budget Reconciliation Act of 1993, Public Law No. 103-66, Title VI, ss. 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993).

[2] G.L. c. 159, ss. 12, 12A-12D, provides the Department jurisdiction over RCC service in Massachusetts. The statute requires that RCCs obtain a certificate of public convenience and necessity from the Department prior to offering service in Massachusetts and grants the Department jurisdiction over RCC rates. G.L. c. 159, ss. 12B, 12C. Specifically, G.L. c. 159 ss. 12B-12D will be preempted by Section 332 of the Communications Act, as revised by the Budget Act, which governs the regulation of all "mobile services," as defined by Section 3(a) of the Communications

08/05/94 [Commercial Mobile Radio Services] Investigation by the Department of

Act.

replacement for land-line telephone exchange service for a substantial portion of the telephone land-line exchange service within such state.

The Department opened this investigation to determine whether to petition the FCC for authority to continue rate regulation of RCCs after August 10, 1994. The Department also sought comments on the regulation of other terms and conditions of RCC service in Massachusetts, such as liability of the company, use of service, and consumer protection issues, and the repeal of 220 C.M.R. ss. 35.00 et. seq., which provides procedural rules for the Department's regulation of radio common carrier service.

The Department allowed interested parties to submit written comments on these issues by May 12, 1994. The Department also held a public hearing at the Department's offices on May 17, 1994. The Department allowed until June 30, 1994, for the filing of any additional written comments, and until July 20, 1994, for the filing of reply comments.

Pursuant to the Department's request for written comments, MCI Telecommunications Corporation ("MCI"), Southwestern Bell Mobile Systems, Inc. d/b/a Cellular One ("Cellular One"), NYNEX Mobile Communications Company ("NYNEX Mobile"), Bell Atlantic Mobile Systems ("BAMS"), SNET Mobility, Inc. ("SNET Mobility"), MobileMedia Communications, Inc. ("MobileMedia"), GTE Mobilnet Incorporated ("GTE Mobilnet"), Tri-State Radio Co. ("Tri-State"), Arch Connecticut Valley, Inc. ("Arch"), Paging Network Inc. ("PageNet"), Berkshire Communicators ("Berkshire"); QuickCall

Corporation ("QuickCall"), and MobileComm of the Northeast, Inc. ("MobileComm") filed comments. On June 15, 1994, and June 30, 1994, Cellular One and NYNEX Mobile, respectively, filed additional comments in reply to MCI's initial comments.

II. POSITIONS OF THE PARTIES

A. MCI

MCI argues that the Department should petition the FCC for authority to continue rate regulation of CMRS in Massachusetts in order to maintain the status quo and to protect subscribers in a market characterized by very limited competition (MCI Comments at 4). MCI argues that the Department should use this docket to establish the general dominant/nondominant regulatory structure for the CMRS industry in Massachusetts (id. at 2-3).

MCI also maintains that regulatory oversight of "other terms and conditions" of CMRS providers is "extremely important" in order to create MCI's proposed new regulatory structure for the CMRS industry (id. at 5). MCI argues that the Department should require

that terms and conditions of the intrastate interconnection and access offerings of dominant CMRS providers be fair and reasonable, and do not unreasonably discriminate against any customer, including competing providers of CMRS (id. at 6).

MCI argues that the Department should extend "co-carrier" status to CMRS providers and should adopt principles of "mutual

compensation" (id. at 7).[3]

B. Cellular One

Cellular One asserts that "fierce" competition in the telecommunications market protects the public from unjust and unreasonable wireless service rates and from rates that are unjustly or unreasonably discriminatory (Cellular One Comments at 1). Cellular One argues that with new wireless technology and the introduction of competitors in the marketplace on a regular basis, existing cellular providers are prevented from allowing their prices to become unjust, unreasonable or unduly discriminatory (id. at 2).

In addition, Cellular One asserts that wireless technology is used by less than ten percent of the Massachusetts population, and therefore, cellular service cannot be considered a substitute for landline exchange service (id.).

Cellular One argues that MCI's proposals are beyond the scope of this proceeding and do not reflect existing conditions in the increasingly competitive wireless marketplace in Massachusetts (Cellular One Reply Comments at 1). Cellular One argues that the Department should deny MCI's proposals (id.).

Cellular One also argues that because MCI's proposals are

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[3] MCI indicates that "co-carrier" status is a classification used by the California Public Utilities Commission to represent certain requirements for interconnection and mutual compensation (MCI Comments, Attachment B, at 5-6). MCI defines mutual compensation as "recovery by CMRS providers of the reasonable cost of terminating calls originating on local exchange carrier networks, and vice versa" (id. at 7).

beyond the scope of the legal notice for this proceeding, the Department cannot consider them without the publication of a new and expanded notice and the opportunity for all interested parties to comment (id. at 2).

C. NYNEX Mobile

NYNEX Mobile asserts that the Department should not petition the FCC and should forbear from regulation of mobile services

(NYNEX Mobile Comments at 20). NYNEX Mobile argues that the mobile marketplace is vigorously competitive and that mobile communications is not a replacement for telephone landline exchange service within the state (id. at 3). Also, NYNEX Mobile contends that the Department should repeal 220 C.M.R. Section 35 (id. at 16).

NYNEX Mobile estimates that its service penetration rate in its region is 1.77 percent and that the penetration rate for landline telephone exchange service in the NYNEX region exceeds 90 percent (id.). Therefore, according to NYNEX Mobile, it cannot be argued that cellular services have replaced basic telephone service for a substantial portion of the Massachusetts population (id. at 4).

NYNEX Mobile argues that: (1) its terms and conditions are disclosed in full on each customer's service order forms; (2) service representatives and sales channels are trained to address customer issues; and (3) customers regularly see notices in customer newsletters and bill inserts (id. at 17). NYNEX Mobile argues that customers who are dissatisfied with their current

provider may take their business elsewhere, and customers are thus protected by a competitive marketplace, which is "the most powerful and effective mechanism controlling service terms and conditions" (id. at 17-18).

NYNEX Mobile also argues that the Department should reject MCI's recommendation for the Department to file a petition with the FCC to continue the regulation of wireless service (NYNEX Mobile Reply Comments at 4). NYNEX Mobile points out that MCI was the only commenter to request the Department to petition the FCC for continued rate regulation of CMRS (id. at 1).

NYNEX Mobile also asserts that MCI inappropriately seeks to convert this docket into a broad-ranging proceeding (id. at 2). NYNEX Mobile notes that the interstate interconnection and compensation issues raised by MCI are under consideration in pending FCC proceedings, and that any intrastate interconnection and compensation issues would be more appropriately handled in another proceeding (id. at 3).

D. BAMS

BAMS urges the Department not to petition the FCC to continue regulation of rates beyond August 10, 1994 (BAMS Comments at 18). BAMS states that the market conditions in Massachusetts do not support continued rate regulation and make it impossible to meet the statutory tests for continued regulation (id. at 3). According to BAMS, market forces are adequate to protect the public and cellular service is not a replacement for landline telephone service (id. at 15).

BAMS states that the cellular radio service penetration rate nationally is about four percent while the landline service penetration rate is about 95 percent (id.). BAMS further asserts that neither the price nor the capacity of cellular radio service suggests that cellular will become a substitute for landline service for a substantial portion of the Commonwealth's population in the foreseeable future (id.).

BAMS also argues that the existing level of competition at the wholesale and retail levels for cellular service in Massachusetts does not support rate regulation for consumer protection purposes (id. at 16). BAMS further states it is not in the best interest of a cellular radio service operator to engage in unjust, unreasonable or discriminatory practices or to charge unjust or unreasonable rates in such a competitive environment (id.).

E. SNET Mobility

SNET Mobility argues that its Springfield market for cellular services is competitive, and bases its argument on the existence of suitable substitutes including paging, specialized mobile radio services, and mobile data services (SNET Mobility Comments at 5). SNET Mobility argues that this competitiveness will increase in the next year as the FCC proceeds to license new forms of mobile services, such as Personal Communications Services and mobile satellite services (id. at 9).

SNET Mobility maintains that the introduction of new sources of competition will intensify competitive forces in the mobile

services market, forcing providers to provide additional network services and enhance price competition (id. at 17). SNET Mobility argues, accordingly, that current market conditions are adequate in mobile services to protect subscribers and to protect end users from unjust and unreasonable rates (id.).

F. MobileMedia

MobileMedia asserts there is no longer a need for the regulation of rates of paging service or "other terms and conditions" of paging services (id. at 3). According to MobileMedia, competitive market forces created by the large number of providers ensures public protection from discriminatory or unreasonable rates or unreasonable conditions of service (id.). In view of these market conditions, MobileMedia urges the Department to repeal its regulation of radio utilities and not petition the FCC to continue regulation of paging service rates (id. at 5-6).

MobileMedia argues that price competition in the paging industry should be distinguished from competition in the cellular industry, because while the FCC has allocated portions of radio spectrum to two cellular facilities-based carriers, no such limitation exists in the paging industry (id. at 4). Consequently, according to MobileMedia, there are significantly more paging

companies than cellular providers, and thus more price competition (id.).

Regarding the regulation of "other terms and conditions" of paging services, MobileMedia asserts that competition makes

regulation of services and billing practices unnecessary (id. at 5).

MobileMedia also supports the repeal of regulations regarding certification of radio utilities set forth at 220 C.M.R. s. 35.00 (id.).

G. GTE Mobilnet

GTE Mobilnet argues that: (1) the cellular marketplace is currently competitive and competition will increase in the near future; and (2) cellular service is discretionary in the sense that it is not a necessity (GTE Mobilnet Comments at 1.) GTE Mobilnet argues that these two factors obviate the need for the Department to petition the FCC to continue the regulation of rates of CMRS after August 10, 1994 (id.).

GTE Mobilnet argues that competition manifests in two ways: (1) direct competition provided at the wholesale and retail levels through other service providers; and (2) through alternative service providers such as paging, pay phones, and Specialized Mobile Radio Services (id. at 3).

GTE Mobilnet asserts that market forces in Massachusetts adequately protect the public from unjust and unreasonable wireless service rates and from rates that are unjustly or unreasonably discriminatory (id. at 9). Also, GTE Mobilnet states that the Department has no need to regulate other "terms and conditions" of cellular service because market forces act as a regulator (id.).

H. Tri-State

Tri-State argues that with respect to paging CMRS, the extremely competitive nature of the paging industry both nationwide and in Massachusetts makes unnecessary any regulation by the Department (Tri-State Comments at 5). Tri-State further asserts that regulation, whether consisting of regulation of rates or "terms and conditions," will inhibit competition between paging service providers and will deprive the public of substantial benefits that result from "aggressive competition" (id. at 4).

Tri-State maintains that the regulation of "other terms and conditions" of CMRS, including company liability, use of services and consumer protection issues, is not necessary given the extremely competitive state of the paging industry in Massachusetts (id. at 8).

Tri-State emphasizes that its comments relate to the paging CMRS industry and not the two-way mobile CMRS industry (id. at 9).

Tri-State argues that this distinction is critical because conditions in the cellular market may warrant a petition by the Department for regulation of rates, the imposition of new regulations regarding company liability, the use of services, or consumer protection issues (id. at 10). Tri-State asserts that findings regarding the two-way marketplace should not affect Tri-State's assertion that the competitive status of the paging CMRS market renders continued regulation by the Department "unnecessary and counterproductive" (id.).

I. Arch

Arch asserts that market forces in Massachusetts provide fair and reasonable service rates to the public for commercial mobile radio services (Arch Comments at 1). Arch argues that the Department should repeal 220 C.M.R. s. 35.00, because, after federal preemption of entry regulation, no legal basis remains for the regulation of the extension of mobile radio utility systems, or transfers of certificated facilities (id. at 3).

J. PageNet

PageNet argues that the Department cannot meet the required burden of proof to establish the need for continued regulation of paging service in Massachusetts (PageNet Comments at 1).

PageNet maintains that the paging market in Massachusetts is highly competitive and that market conditions adequately protect the public from unjust and unreasonable discriminatory rates (id. at 4). PageNet also asserts that paging is not a replacement for landline telephone service, but rather an enhancement or complement (id.).

K. Berkshire

Berkshire states that it does not see any advantage for the Department to continue regulation of RCCs after August 10, 1994, unless the Department can regulate other currently unregulated services as well (Berkshire Communicators Comments at 1).

L. QuickCall

QuickCall states that a competitive market without regulation provides "a lower cost of doing business, better

service to our customers, and better flexibility in meeting customer needs in the market place" (QuickCall Comments at 1). Further, QuickCall asserts that its costs are significantly higher in regulated markets, such as Massachusetts and California (id.).

M. MobileComm

MobileComm asserts that the Massachusetts marketplace is strongly competitive for paging services and that market forces are extremely effective in keeping prices at a competitive level (id. at 1). Accordingly, MobileComm argues that rate regulation at the state level is no longer necessary (id. at 2). Regarding the regulation of "other terms and conditions," MobileComm argues that competitive market forces provide an adequate balance between customers and providers in reaching an agreement on terms of service (id.).

III. ANALYSIS AND FINDINGS

A. Rate Regulation

In order to successfully petition the FCC for the authority to continue RCC rate regulation, the Department would have to demonstrate that:

> (1) market forces in the state are inadequate to protect the public from unjust and unreasonable wireless service rates or from rates that are unjustly or unreasonably discriminatory; or
>
> (2) such market conditions exist and such service is a replacement for land-line telephone exchange service for a substantial portion of the telephone land-line exchange service within such state.

In 1984, the Department determined that the wireless service

market in Massachusetts was competitive (see Cellular Resellers, D.P.U. 84-250, at 6 (1984)). We note that most commenters cited an increase in the number of RCCs in Massachusetts and a corresponding reduction in rates as indications that competition in the Massachusetts wireless market has increased since that time to the benefit of consumers.[4] Based on the comments received in this docket, the Department finds that the wireless market in Massachusetts remains competitive. Accordingly, we find that market forces in the state are adequate to protect the public from unjust and unreasonable wireless service rates or from rates that are unjustly or unreasonably discriminatory. Also, we find that wireless service in Massachusetts is not a replacement for land-line telephone exchange service for a substantial portion of the telephone land-line exchange service within the Commonwealth. Therefore, the Department shall not petition the FCC for authority to continue rate regulation of RCCs in Massachusetts.[5]

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[4] MCI was the only commenter to recommend that the

characterized by "very limited competition." MCI also recommended that the Department use this docket to establish a dominant/nondominant regulatory framework for wireless service in Massachusetts. We find that establishment of a regulatory framework for RCC regulation in Massachusetts is beyond the limited scope of this investigation, and, furthermore, that our findings herein render MCI's request moot.

[5] If the Department determines later that market conditions in Massachusetts are such that it desires to reinstate rate regulation, it will petition the FCC at that time, pursuant to section 332(c)(3)(a) of the Budget Act.

B. Regulation of Other Terms and Conditions

As of August 10, 1994, the Department will no longer regulate the rates of RCCs in Massachusetts (see section III.a, above) and will no longer regulate the entry of RCCs into the market.[6] We have found that market forces in the state are adequate to protect the public from unjust and unreasonable wireless service rates; these market forces also make it unnecessary for the Department to regulate other terms and conditions of RCC service in Massachusetts. Therefore, as of August 10, 1994, the Department will not regulate other terms and conditions of RCC service in Massachusetts.

RCC tariffs that are currently on file with the Department primarily list rates and other terms and conditions. Because the Department will no longer regulate RCC rates and other terms and conditions, it is not necessary for the Department to maintain RCC tariffs, as of August 10, 1994.

C. Repeal of 220 C.M.R. ss. 35.00 et. seq.

220 C.M.R. ss. 35.00 et. seq., provides procedural rules for the Department's regulation of RCC rates and market entry. Given that the Department will no longer regulate RCC rates and market entry as of August 10, 1994, we find that 220 C.M.R. ss. 35.00 et.

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[6] The Department considers the requirement that a carrier obtain a certificate of public convenience and necessity ("certificate") to be a form of market entry regulation. Similarly, regulatory approval of a transfer of a certificate is a form of entry regulation. Therefore, because the Department is preempted from entry regulation as of August 10, 1994, RCCs need no longer file applications for a certificate or for approval of certificate transfers.

seq. should be repealed.[7]

IV. ORDER

Accordingly, after due notice, hearing, and consideration, it is

ORDERED: That the Department will not petition the Federal Communications Commission for authority to continue rate regulation of radio common carriers in Massachusetts after August 10, 1994; and it is

FURTHER ORDERED: That the Department will not regulate other terms and conditions of radio common carrier service after August 10, 1994; and it is

FURTHER ORDERED: That the Department will not maintain tariffs for radio common carriers after August 10, 1994; and it is

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[7] 220 C.M.R. s. 35.01, "Authority," provides "these rules are issued pursuant to M.G.L. c. 159, s. 12E, authorizing the Department to issue rules and regulations governing the issuance of certificates for the construction, operation, and extension of mobile radio utility systems by radio utilities."

FURTHER ORDERED: That 220 C.M.R. ss. 35.00 et. seq. be and hereby is repealed.

By Order of the Department,
/s/ KENNETH GORDON
Kenneth Gordon, Chairman
/s/ BARBARA KATES-GARNICK
Barbara Kates-Garnick, Commissioner
/s/ MARY CLARK WEBSTER
Mary Clark Webster, Commissioner

A true copy
Attest:
MARY L. COTTRELL
Secretary

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the

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Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971)